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Supreme Court of the United States

October Term, 1956

No. [redacted] 213

THE WEBSTER MOTOR CAR COMPANY,
Petitioner

v.

PACKARD MOTOR CAR COMPANY, et al
Respondents

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.
Attorneys for Petitioner

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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THE WEBSTER MOTOR CAR COMPANY,
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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Preliminary Statement

The jury verdict for Webster was set aside by the Court of Appeals.

That court interpreted the *Cellophane* decision of this Court as requiring this drastic step.

In reversing the jury verdict, the majority below laid down a rule-of-law, declaring agreements or conspiracies *per se* legal if, in the opinion of appellate judges, the product involved is as "reasonably interchangeable" with others as they consider cellophane to be with glassine, waxed paper and foil.

On this theory the majority below felt there was no need to examine the evidence to see whether there was enough to go to the jury, and did not do so. Only Judge Bazelon, dissenting, did so, and he found there was ample evidence to support the jury verdict.

The majority below, having *first* concluded as a matter of law that Packard and Zell had a right to carry out an agreement to terminate Webster's franchise on March 31, 1952, could see nothing wrong in Packard's and Zell's agreeing, after notice of this suit, to offer to renew Webster's franchise to run until March 31, 1953, with the secret understanding between them that it would be Webster's last renewal. To the majority, Packard and Zell would merely be postponing until March 31, 1953, what they had a perfect right to do a year before.

The foregoing analysis reveals the erroneous nature of the action of the majority below. We now point out the fallacies of the arguments advanced by Packard to justify the action below.

1. *Packard's Contention That The Essential Facts Were Undisputed And Hence No Jury Question Was Involved*

To justify the appellate court's ignoring the jury verdict, Packard claims that the "essential facts" were "undisputed" and that the "undisputed" facts did not warrant submission to the jury. (Br.Op. 5-7, 10-11, 14-22.)[1]

But the trial judge submitted the case to the jury after setting forth the conflicting contentions of the parties as to the facts (R. 936-949). In denying Packard's motion for judgment n.o.v., his opinion (R. 136 and 135 F.Supp. 4) makes it clear that he considered that the principal facts were in dispute. To anyone who reads *either* his charge *or* his opinion, it is obvious that he left to the jury the resolution of the conflicts of testimony and claims on all vital issues.[2]

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[1] "Br.Op." refers to Packard's brief in opposition; "Ptn." refers to the petition for certiorari; "R." refers to the joint appendix.

[2] The instructions left the following issues among others to the jury: (a) whether Zell devised and effected an agreement with Packard to eliminate Zell's Packard-dealer competitors, or whether their elimination was done in the exercise by Packard of permissable business judgment and not pursuant to any conspiracy or agreement (R. 940, 943-944); (b) whether the public was in-

This action by the trial judge is not inconsistent with his remarks quoted by Packard in its brief in opposition (BrOp. 5-7). He was referring to the difference between Packard's denials and the evidence. For example, Packard denied throughout the trial that it had conspired or agreed with Zell to terminate Webster's franchise;[3] yet Packard's own witnesses and documents left little or no basis for denial of the agreement.[4] The quoted comments

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jured by elimination of competition in the sale and servicing of Packard cars in metropolitan Baltimore, or whether the competition more important to the public was that between Packard and other makes of cars there (R. 945); (c) whether the agreement (if one was found to exist) was unreasonable in view of all the facts of the case (R. 943-944); (d) whether Packard's renewal offer was made in good faith or in bad faith as part of an agreement with Zell to eliminate Webster (R. 941) and (e) whether Webster was damaged by what Zell and Packard did, or by his own act (R. 945).

[3] Packard *began* with this denial (Pars. 21, 51 and 64 of the Complaint and Answer at R. 6-7, 15, 21, 36, 43, 46). It *ended* on the same note. Its counsel, in concluding his closing argument, said (R. 922):

> "It was an independent decision reached upon consideration of the factors which I have discussed with you today, and about which you have heard evidence over these many, many days. *It was no conspiracy, contract, or combination between Packard and Zell.*" (emphasis supplied)

[4] Packard's General Sales Manager, Briggs, under cross examination as to what Zell "agreed" to do if made the sole dealer, replied (R. 536-7):

> "I recall the highlights of it. First, he was to renew the leases on his facilities to maintain service. He was to increase his organization, salesman power-wise, the number of salesmen at the moment I can't recall. He was to guarantee to us or try to give us a larger percentage of the Packard business in Baltimore as a sole dealer than we had been able to get with two dealers. *Those are the highlights of the agreement.*" (emphasis supplied)

During the deposition of the defendant Beck (R. 283-5), Packard's Washington, D. C. Zone Manager, he, too, admitted the agreement; but Packard's counsel immediately requested a recess and, upon resuming, Beck said he would like to change his testimony to eliminate his admission that "we had agreed." When asked

are thus seen to be nothing more than the trial judge's mild censure of Packard for having defied undeniable facts.

And in any event the trial judge's remarks, made during a needlessly long trial, cannot alter the fact that when the closing arguments were over, the jury was told, in effect, that issues existed as to every essential fact. The jury was informed of the conflicting evidence and contentions of the parties; and was instructed, "The facts are for you to determine." (R. 936-949 at 945.)

2. *Packard's Contention That The Court Below Based Its Reversal On A Careful Review Of The Evidence*

Trying to denude this case of its antitrust importance, Packard contends that the Court below, after a careful review of the evidence, simply held that there was not enough to go to the jury.

To anyone who reads the opinion of the majority below, this contention must appear absurd. They obviously rested their decision on the belief that in accordance with the *Cellophane* decision, the *Schwing* case and Professor Handler's newly-proclaimed theory that such exclusive territorial dealerships are virtually *per se* lawful, the Packard-Zell agreement was, *as a matter of law*, lawful. To them, it was thus unnecessary to review the evidence and they made no pretense of doing so.

Instead of defending what the majority below *actually* did, Packard tries now to prove they did what Judge Bazelon in his dissent said, and we say, they *should have* done. Nothing could illustrate more forcefully that

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why, he admitted that during the recess he had "discussed it with the attorneys."

Written admissions of the agreement, made by Packard's co-conspirator Zell in letters to Packard officials, were put in evidence as Pltf's. Exs. 33 and 37 (R. 997, 999-1000).

Packard now recognizes the seriousness of the error of the majority below in doing what they did.

It is for its antitrust significance that the *Webster* case is already being cited and discussed. See *United States* v. *Guerlain, Inc.*, 26 U.S. L.Wk. 2041 (D.C.S.D.N.Y.), decided July 9, 1957, opinion by Edelstein, J. (discussed *infra*, p. 8); and the *American Bar Association Journal*, July 1957, Vol. 43, p. 645.[5]

It is clear from the majority opinion below that they felt that as a matter of law Packard had a right to carry out an agreement with Zell to terminate the franchises of his Packard-dealer competitors. However, it is not so clear *why* they concluded that "there are other cars 'reasonably interchangeable by consumers' for the same purposes' as Packard cars and therefore in competition with Packards" (Ptn. 25). Unlike duPont's elaborate proof of cross-elasticity between cellophane and other flexible packaging materials, Packard offered no proof as to when or why an owner of a Packard will switch to another make of car, or vice versa; or what cross-elasticity there was for Packard owners wishing Packard-authorized service in Baltimore after Zell became sole dealer there. To the contrary, the jury apparently found on ample evidence that the competition between the Baltimore Packard dealers was more important to the public than the competition between Packard and other makes of cars there (see Ptn. 8-9 and 33; R. 944-5).

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[5] In this issue of the *Journal*, under the heading "What's New in the Law," the first paragraph of comments concerning the *Webster* case reads as follows:

> "The Cellophane case's 'relevant market' doctrine, formulated by the Supreme Court in *U.S. v. du Pont*, 351 U.S. 377, has been applied by the Court of Appeals for the District of Columbia Circuit to deny treble-damages recovery to a Baltimore Packard dealer whose suit was predicated on a charge that Packard refused to renew its franchise because of an agreement to make another the exclusive dealer in Baltimore."

The majority below reached the conclusion that other cars are "reasonably interchangeable" with Packards either (a) by taking "judicial notice" thereof, or (b) by reasoning that if cellophane is "reasonably interchangeable" with foil, waxed paper and glassine, Packard *must be* "reasonably interchangeable" with other makes of cars. Whichever of these two routes they followed, they erred in doing so. Unless this Court rejects such appellate fact finding, unsupported by and contrary to the record and jury verdict in the case under review, other lower Federal courts will follow suit.

3. *Packard's Contention That Webster Caused Its Own Loss By Rejecting The Renewal Offer*

Packard asserts that Webster has only itself to blame for the loss of its business because it "rejected the usual one-year renewal of its dealership agreement." (Br.Op. 1, 5, 7-8.)

Again, the jury verdict, supported by ample evidence, is to the contrary (R. 945 and 940-3). As Judge Bazelon said in his dissent (Ptn. 29), there was sufficient evidence to support a jury finding that "the renewal offer was not made in good faith, was prompted by Webster's threat to sue, and resulted from an agreement between Packard and Zell that it would be the last renewal."

The portions of the majority opinion which Packard relies on to prove that Webster caused its own loss (Br. Op. 7-8) make clear two facts:

> *First*, That, as the majority below said, Packard did not offer to renew Webster's franchise until "After Webster protested and threatened suit . . ."; and *Second*, That, as the majority below said, "Packard had agreed with Zell not to renew Webster's contract again when the proffered renewal expired . . ."

Nevertheless, they went on to conclude that this "is immaterial not only because the agreement was legal but also because it inflicted no damage."

Of course, *if*, as the majority had previously concluded, Packard had a right, a a matter of law, to carry out an agreement with Zell to terminate Webster's franchise on March 31, 1952, the fact that they agreed to offer to renew his franchise and let it run until March 31, 1953, would be "immaterial" because this agreement, too, would then be "legal" and would have "inflicted no damage." *But*—and this is the point—*if* Packard had no such right as a matter of law, *and if* it was within the proper province of the jury to determine that in carrying out an agreement with Zell to terminate Webster's franchise on March 31, 1952, Packard unreasonably restrained trade in violation of Sec. 1, then the fact (recognized by the majority below) that Packard's renewal offer was not made until after notice of suit, and then only after agreeing with Zell that it would be Webster's last, is most material, supporting a jury finding of Packard's gross bad faith, and Webster's damages.

Thus, what the majority below *said* about the renewal offer appears to have been merely a logical extension of what they had previously *held* as to the legality of the Packard-Zell agreement to eliminate Webster. If, as we contend, their holding was wrong, their extension topples, too.

Certainly it cannot be argued that in offering to renew Webster's franchise after notice of suit and after having secretly agreed with Zell that it would be Webster's last, Packard was offering Webster the equivalent of what it had had in previous years. At the very least Packard and Zell deprived Webster of the right to have a future possible renewal given a fair consideration, as distinguished from being foreclosed in advance by a cut-and-dried agreement. Always before, in addition to a one-year renewal, Webster had had a reasonable expectancy of further renewals. It was on this expectancy that just two years before, Webster, on Packard's advice and urging, had invested almost $100,000 in buying, rebuilding

and re-equipping his burned-out facilities (Ptn. 36). Bad faith as to the proffered renewal probably served to bolster the jury's impression of Packard's bad faith generally.

While Webster's renewal expectancy might not have been enforceable by a contract action, it was protected by the antitrust laws from conspiratorial interferences in unreasonable restraint of interstate commerce. Said another way, the fact that Packard might have had a contract right to refuse to renew Webster's franchise would not insulate Packard from the antitrust laws if in carrying out a conspiracy in unreasonable restraint of trade it accomplished its purpose by exercising that right.

In contending that Webster caused its own loss, Packard, in effect, claims that the pronouncements as to antitrust law in the majority opinion below can safely be left unchallenged on the theory that the case will not be cited theryfor and will be distinguished as resting on other grounds. This claim is illusory. See *United States* v. *Guerlain, Inc.*, 26 U.S. L.Wk. 2041 (D.C.S.D.N.Y.), decided July 9, 1957, opinion by Edelstein, J.[6]

Because of the brevity of the majority opinion, there might be some doubt as to the chronology of events con-

[6] The *Guerlain* case involved a Sec. 2 charge of monopoly of one brand of perfume. The defense relied on the *Webster* and *Schwing* cases as holding that the product of a single manufacturer cannot constitute a relevant market. In holding Guerlain liable, Judge Edelstein had great difficulty in reconciling his decision with the *Webster* and *Schwing* decisions. He finally distinguished them on the ground that there is probably greater cross-elasticity between various makes of automobiles than between different brands of perfumes.
Thus, in order to avoid the anti-antitrust effect of the majority opinion below, District Court judges are already having to draw very dubious and tenuous distinctions. Compare the alternatives available to a Packard owner who needs a new Ultramatic transmission for his Packard with those afforded one who goes into a drug store to buy, off-the-shelf, an ounce bottle of perfume.

cerning Packard's renewal offer. In Appendix A to this brief, those facts, as established almost entirely by Packard employees and documents binding on Packard, are set forth.

4. *Packard's Contention That There Was No Unreasonable Restraint of Trade*

Packard makes the following three arguments to prove that it did not unreasonably restrain interstate commerce by carrying out its agreement with Zell to eliminate his competitors:

> a. It agreed with Zell to make him sole dealer in order to improve Packard's competitive position vis-a-vis manufacturers of other cars.
>
> b. It is a relatively small automobile manufacturer and therefore, inferentially, it should have greater antitrust rights than General Motors.
>
> c. Webster was not a satisfactory dealer but Zell was.

The short answer to all these arguments is that the jury has already rejected them by finding the restraint unreasonable. The dissent below rests primarily on the fact that "the court properly instructed the jury upon the law applicable to conspiracies . . . in restraint of trade in violation of Sec. 1 of the Sherman Act and . . . the evidence supports the jury's finding in respect thereto." (Ptn. 27)

Turning briefly to each of these contentions: First, in answer to Packard's contention that it did what it did in order to improve its competitive position vis-a-vis manufacturers of other cars, Packard's alleged motive in agreeing with Zell to destroy *his* competitors is but one of many factors which the jury must have considered in measuring what was done by the rule of reason. The most benevolent motive would not make reasonable a restraint which, as in the case at bar, the jury on all the facts must have found unreasonable. See *Fashion Orig-*

inator's Guild v. *Federal Trade Commission*, 312 U.S. 457 (1941).

Certainly to the majority below, *why* Packard did what it did was of no decisive significance. They did not analyze the various factors one would consider in determining the reasonableness of the restraint.[7] To them, the decision of this Court in the *Cellophane* case compelled reversal—regardless of *why* Packard did what it did. They felt that other cars are as "reasonably interchangeable" with Packards as glassine, waxed paper and foil are with cellophane. Any doubts the majority might have had as to whether they should wade through the record in order to see whether there was sufficient evidence to support the jury's finding of unreasonableness, were removed when they learned that Professor Handler had recently said in a speech to the Association of the Bar of the City of New York that such an exclusive territorial dealership as Packard gave Zell was virtually *per se* lawful.

Only Judge Bazelon was concerned enough about why Packard did what it did to examine the evidence to see whether it would support a jury finding of unreasonable

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[7] The majority opinion does not comment on the fact that the evidence warranted jury findings that Zell's statement that it was losing money was untrue (Ptn. 34); that Packard knew this (Ptn. 34); and also knew that Zell had unduly inflated the cost of cars and service when he formerly had the field to himself (Ptn. 33). Nor as to whether a manufacturer threatened as Packard was by Zell should test the reality of the threat (Ptn. 36) or discuss the problem with the other affected dealers (Ptn. 37), or seek a substitute for the threatening dealer (Ptn. 37). Or seek alternatives to the destruction of dealers whom it had established in the belief that multiple dealership competition was in its own interest (Ptn. 33, R. 497-499), and who were making money (Ptn. 36), and against whom it had no thought or basis for cancellation for cause (Ptn. 36). Nor was the evidence discussed as to whether competition between the Baltimore Packard dealers benefited the public, as the jury necessarily found under the court's instructions (R. 942-5).

restraint. He concluded it would. He expressly rejected Packard's claim and said that this is *not* a case involving a manufacturer who, after a discussion with one dealer, decides to make the latter his exclusive distributor, cutting off all others, for the purpose of improving the manufacturer's position vis a vis more powerful manufacturers (Ptn. 28).

"Second, in answer to Packard's contention that it is a relatively small automobile manufacturer; we agree that, compared to General Motors, Packard is small. But, compared to Packard, Webster was microscopic. It is absurd for Packard to try to generate sympathy by comparing its size to that of other automobile manufacturers. Indeed, Packard's being small might, in part, be due to just such short-sighted business practices as agreeing with Zell to destroy good Packard customers (Webster and DeBaugh)."

Packard ignores the fact that the antitrust laws do not penalize the large and reward the small as such. They protect competition, and, until the decision below, they punished those who combined unreasonably to destroy it. The fact that Packard is a relatively small giant is immaterial and should evoke no sympathy.

Strangely enough, the majority below seems to have attached some significance to Packard's being a "relatively small manufacturer" (Ptn. 26). The inference that they would permit those relatively small to fight unfairly while requiring those larger, on pain of treble damages, to keep their punches up, establishes a dual standard of antitrust liability; another reason why review by this Court is urgently needed.

Third, in answer to Packard's contention that Webster was not a satisfactory dealer but Zell was; Packard's own officials and documents proved the contrary. Braden, Packard's Washington Zone Manager before Beck (1945-50), testified that Packard had always found Webster a

satisfactory dealer (R. 434) with a capable and aggressive sales force (R. 462). Two Dealer Contract Reports written by Packard's R. G. Funk three days before and three weeks after Webster's franchise terminated on March 31, 1952, show that this Packard official was making similar evaluations of Webster to his superiors (R. 1043, 1048).

The decision to claim that Webster was not a satisfactory dealer was apparently a Packard afterthought for jury effect. In 1951, Packard estimated that Webster was able to sell 200 new cars (R. 966, 968). On April 22, 1952, Packard increased this estimate by almost 50% to 291 cars (R. 985).

Packard's argument that Webster had not been a satisfactory dealer (Br.Op. 4, 18-19) is based on three Packard interoffice memoranda (Defs.' Exs. 15, 16 and 17 at R. 1073, 1075 and 1080). These memoranda were written by Packard employees Platfoot and Marnocha. Packard failed to call either as a witness.*

Packard introduced various charts made up solely for the purpose of the trial designed to prove that Zell gave the public a better deal than Webster (Defs.' Exs. 26 and 81A-81J at R. 1131 and R. 1164-80; R. 677, 825-7). The jury might well have given them little weight for ample reasons brought out during cross examination of the witnesses who prepared them. The jury probably realized that if Zell gave the public a better deal than his Packard-

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* Even these documents contain no greater indictment of Webster than that Platfoot and Marnocha felt Webster should make larger trade-in allowances. Since Webster was destroyed because Zell resented its competition, for Webster to have competed more vigorously would probably have quickened Zell's "ultimatum" (R. 260) and Webster's demise.

Defs.' Ex. 16 (R. 1075-7) is far more critical of Zell than of Webster. Zell's name heads the list of "Problem Dealers" and he is charged with being a "Loss dealer; low new car volume."

dealer competitors, the public would have bought from Zell. They knew that Zell had complained that he had tried but failed to sell 60% of the people who bought Packards from Schulte (R. 1080 at 1082). Zell's bleat, not Packard's charts, tells the true story; i.e., Zell's Packard-dealer competitors were giving the public a better deal and consequently were getting the business.

Packard claims that after Zell became sole dealer, he was benevolent. If, after notice of suit, Zell had been generous to the Baltimore public, that fact could not wipe out Packard's liability. The kind of dealer Zell was after April 1, 1952 is best evidenced by his ads for salesmen "tired of multiple dealer competition" (R. 1055), his deceitful price-padding practices (R. 1060-6 at 1060-3), and a Packard report in 1954 telling Zell that his "market potential is much greater than even your present new car sales indicate" (R. 1058-1060).

5. *Packard's Contention That The Waldrip And Fedderson Cases Support The Majority Below*

In *Hudson Sales Corp.* v. *Waldrip*, 211 F.2d 268 (C.A. 5, 1954), *cert denied* 348 U.S. 821, a decision for the dealer by a District Court sitting without a jury was reversed and judgment entered for the defendants. The alleged conspiracy was between Hudson Motor Co. and Hudson Sales Corp., its wholly-owned subsidiary. The Court of Appeals, at p. 273, expressed doubt that such a "conspiracy" was actionable, citing its prior decision in *Nelson Radio & Supply Co.* v. *Motorola*, 200 F.2d 99.

The remaining distinctions between the *Waldrip* and *Webster* cases are many. In effect, they are summarized in the following statement by that court (211 F.2d 268, 273):

> "Finally, the only findings that this record would reasonably support are: that, acting on business considerations, defendant determined that plaintiff was

too spread out, his efforts too dispersed to give Hudson the effective representation of master dealer in his territory to which Hudson was entitled; that it did this under its policy, which was not in purpose or effect a violation of any law, to select master dealers who would best serve Hudson's interest; and that having first endeavored to induce plaintiff to produce more worthwhile results, and having found that plaintiff was unable or unwilling to give it the satisfactory service it was entitled to, defendant did not terminate his contract but at its termination according to its terms simply declined to renew it."

Fedderson Motors, Inc. v. *Ward*, 180 F.2d 519, was decided in 1950 by the Court of Appeals for the Tenth Circuit. Six years later, the same court[9] decided *Paramount Film Distributing Corp.* v. *Village Theatre, Inc.*, 228 F.2d 721. At p. 726, it cited with approval the District Court's decision in the *Webster* case. Thus it is obvious that the Tenth Circuit (a) approves the District Court's decision here, and (b) not having reversed *Fedderson*, believes it to be unlike *Webster*.

In *Fedderson*, the Court of Appeals affirmed a decision dismissing, for failure to state a cause of action, an antitrust suit against Hudson, Fred Ward, Inc. (a Hudson distributor) and Fred Ward. Fedderson had alleged that the defendants forced him out of business because he refused to do certain things Hudson wanted him to do, things he considered unreasonable (e.g., to stop operating a business side-line at his dealership; to maintain a business establishment equipped to sell and service 125 new Hudsons a year). The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 136, cites the *Fedderson* and *Waldrip* cases as instances of buyers cut off from supplies "for failure to adhere to

[9] Chief Judge Phillips wrote the opinion in the *Village Theatre* case, and sitting with him were Circuit Judges Huxman and Savage. In the *Fedderson* case, Chief Judge Phillips and Circuit Judges Huxman and Bratton sat; Bratton, J. writing the opinion.

the seller's distribution policy." Packard does not, and could not, claim it cut off Webster for any such reason.[10]

The court also found Fedderson's complaint defective, stating (180 F.2d 519, 522):

> "But these were general allegations in the nature of conclusions, without any averment of specific acts from which it could be determined as a matter of law that defendants violated the act with harmful results to the public."

No one who reads Webster's complaint (R. 1-29) can say that specific acts are not averred.

Neither the *Waldrip* nor *Fedderson* case supports the decision of the majority below, and Packard's reliance on them is unfounded.

CONCLUSION

Packard's brief in opposition does not meet any of the serious antitrust or jury questions raised by the decision of the Court of Appeals. Instead, it obscures the significance of the fact that that court set aside a jury verdict and, in doing so extended the decision of this Court in the *Cellophane* case so as to lay down a grossly anticompetitive rule of *per se* legality.

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[10] On February 20, 1952, Richard Webster requested Beck to notify him of any existing circumstances in the Webster Company which might cause it to fall below the Packard dealer standard "so that I may take swift action to effect your sound suggestions" (R. 969-972 at 970). Beck forwarded this letter to Detroit but, on advice of Packard's counsel, it was never answered (R. 278, 602; Ints. 30 and 31 at R. 55 and 66).
On March 9, 1952, Webster again wrote Beck, expressing the opinion that he was entitled to be told of any weakness in his dealership justifying termination, and stating (R. 973): "If more capital investment were necessary it would be forthcoming; if personnel changes were necessary, they would be made." Again, on advice of counsel (R. 602, 729), no reply was sent to Webster (Int. 50; R. 57, 67).

Packard ignores the fact that the rule of law established by the court below makes antitrust liability dependant solely upon economic market conditions as found by appellant judges—even though contrary to the findings of a jury.

It frequently has been said that treble damage actions are an important aid to the enforcement of the antitrust laws. (*Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329). To render them effective, and for the reasons set forth in the petition for certiorari and this reply, it is respectfully submitted that the petition herein should be granted.

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.
Attorneys for Petitioner

APPENDIX A

Facts Concerning The Renewal Offer

February 11, 1952: Packard agreed to make Zell the sole Baltimore dealer as of April 1, 1952 (R. 997; Int. 27c, R. 54 and 65; Int. 39, R. 56 and 66).

March 27, 1952: Zell's franchise was renewed (R. 1049).

March 31, 1952: Webster's and DeBaugh's franchises expired and, in accordance with Packard's agreement with Zell, were never renewed thereafter (R. 976; Packard's Ans. Pars. 48 and 53 at R. 42-44).

April 3, 1952: Beck admitted telling Mr. Webster on this date "that it was the full intention of the Packard Motor Car Company that he should liquidate his Packard business in Baltimore" (R. 1045-6; see also R. 189-192).

April 15, 1952: Instead of liquidating, Webster retained counsel who notified Packard of this suit (R. 1002; Int. 71 at R. 59, 69).

April 16, 1952: Briggs and Beck conferred with Zell (R. 292-3, 552). Beck was authorized to offer Webster a renewal expiring March 31, 1953. Briggs reported that "This particular situation was reviewed in detail and agreed to by Mr. Zell." (R. 1044.) Beck admitted that he assumed he was instructed to make Webster the renewal offer because of Webster's attorney's notice-of-suit letter (R. 286-9).

April 22, 1952: Packard left with Webster a form for renewal of its franchise, to expire automatically March 31, 1953 (R. 976, 289-90, 980-85). It had not been signed by Packard (R. 980-85). If executed by Webster and Packard, it immediately would have increased Webster's "present requirement for net working capital" by $9,000.[1]

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[1] Webster's "delivery quota" in its 1951-'52 Agreement (R. 966) had been *200* cars. "Dealers Delivery Quota" was defined as "the number of units which the Zone Office estimates to be the

May 14, 1952: Zell wrote to Briggs and asked him to supplement with a letter their verbal agreement to eliminate Webster by March 31, 1953 (R. 1003).

June 10, 1952: Armstrong reported to Briggs that he had talked to Zell, had informed him that Webster had been given until the close of business the following day to sign the tendered renewal, and that "Mr. Zell was entirely satisfied and understands that it is not policy for us to give him the letter requested in his letter of May 14, 1952" (R. 1004).

June 11, 1952: Webster's counsel had delivered to Beck a letter advising him that Webster would sign the renewal contract if Packard would only assure Webster (a) that it would deal with him in good faith and (b) that short of some intervening and unpredictable event, there was no reason to believe that Webster could not look forward to annual renewals in the future as in the past (R. 977-9).

Beck read this letter over the phone to Armstrong in Detroit who then dictated a reply (Int. 94, R. 61 and 71) which Beck delivered to Webster's counsel that day (R. 979). Therein he refused to give the assurances of good faith Webster had requested.

June 17, 1952: Beck notified Packard that all programs for Webster "are cancelled immediately" (R. 1152-5, 1030).

June 18, 1952: Beck notified Packard "The Zell Motor Car Company of Baltimore, Maryland, will now handle the Baltimore Metropolitan Area exclusively . . ." (R. 1008).

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reasonable annual total sales potential of Packard Cars by Dealer" (R. 968; R. 627-8). The renewal offered (R. 985) would have raised Webster's "delivery quota" almost 50% to *291* cars. This "quota" increase would have caused Webster's "present requirement for net work capital" to jump from $36,000 to $45,000 (R. 966-7; R. 985).

April 1-June 18, 1952: Webster's franchise terminated on March 31, 1952. Therefore, its cause of action had accrued by April 1st or, at the latest, by April 3rd, when Beck told Mr. Webster "that it was the full intention of the Packard Motor Car Company that he should liquidate his Packard business in Baltimore".

During the period between April 1st and June 18th, while Webster was trying to persuade Packard to renew in good faith, it had been taking other steps to minimize damages (R. 203-5, 352-5). It had continued to advertise on a "business as usual" basis (R. 1143). It had continued to buy cars from Packard (R. 1072; Packard's franchise form provided that such post-termination purchases would not constitute renewal of the dealer's franchise, R. 967). But after June 18, 1952, being cut off entirely by Packard, Webster sought other means to minimize damages (R. 139).